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PREPARATORY COMMITTEE ON THE ESTABLISHMENT
OF AN INTERNATIONAL CRIMINAL COURT
1-12 December 1997

DECISIONS TAKEN BY THE PREPARATORY COMMITTEE AT ITS SESSION HELD FROM 1 TO 12 DECEMBER 1997

1. At its 54th meeting, on 1 December 1997, the Preparatory Committee decided to conduct its work through the following working groups: Working Group on Definitions and Elements of Crimes (chaired by Mr. Adriaan Bos); Working Group on General Principles of Criminal Law (chaired by Mr. Per Saland); Working Group on Procedural Matters (chaired by Ms. Silvia Fernandez de Gurmendi); Working Group on International Cooperation and Judicial Assistance (chaired by Mr. Pieter Kruger); and Working Group on Penalties (chaired by Mr. Rolf Einar Fife).

2. At its 55th meeting, on 12 December 1997, the Preparatory Committee took note of the reports of the Working Groups mentioned above, which are annexed to the present document (annexes I to V).

3. The Preparatory Committee also tock note that, pursuant to paragraph 7 of General Assembly resolution 51/207 of 17 December 1996, the Secretary-General had established a trust fund for the participation of the least developed countries in the work of the Preparatory Committee and in the diplomatic conference of plenipotentiaries. Guidelines have been established for the administration of the Fund. The following Governments have made contributions to the Fund: Belgium, Canada, Denmark, Finland, Netherlands, Norway and Sweden. Ten States have utilized the Trust Fund to facilitate their participation in the December session. The General Assembly in resolution 51/207 calls upon States to contribute voluntarily to the Trust Fund.

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Annex I

REPORT OF THE WORKING GROUP ON DEFINITIONS AND ELEMENTS OF CRIMES*

The Working Group recommends to the Preparatory Committee the text of the article concerning the definition of war crimes contained in document A/AC.249/1997/WG.1/CRP.9 for inclusion in the draft consolidated text of the convention for an international criminal court. This text supersedes the text contained in document A/AC.249/1997/L.5 on the same subject.

* Incorporating the documents listed in the opening paragraph.

WAR CRIMES*

Article 20 C**

For the purpose of this Statute, war crimes means the crimes listed in this article.

A. Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) wilfully causing great suffering, or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(f) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement;

(h) taking of hostages.

B. Other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law, namely, any of the following acts:

(a)

Option I

(a) intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities;

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* Views were expressed that certain provisions should be placed within square brackets.

** The relative placement of the various options does not indicate in any way the measure of support for such options. Some options commanded very limited support.

Option II

No paragraph (a).

(a bis)

Option I

(a bis) intentionally directing attacks against civilian objects which are not military objectives;

Option II

No paragraph (a bis).

(b)

Option I

(b) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which is not justified by military necessity;[1]

Option II

(b) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be excessive in relation to the concrete and direct overall military advantage anticipated;[1]

Option III

(b) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment;[1]

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[1] It has been accepted that it will be necessary to insert a provision, probably in the general principles section, which sets out the elements of knowledge and intent which must be found to have existed for an accused to be convicted of a war crime. For example: "in order to conclude that an accused had the knowledge and criminal intention required to be convicted of a crime, the Court must first determine that, taking account of the relevant circumstances of, and information available to, the accused at the time, the accused had the requisite knowledge and intent to commit the crime."

Option IV

No paragraph (b).

(b bis)

Option I

(b bis) intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated;

Option II

No paragraph (b bis).

(c)

Option I

(c) attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended;

Option II

(c) making non-defended localities and demilitarized zones the objects of attack;

(d) killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(e) making improper use of flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(f)

Option I

(f) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;

Option II

(f) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

Option III

(f)

(i) the establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;

(ii) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

Option IV

No paragraph (f).

(g)

Option I

(g) intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

Option II

(g) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

(h) subjecting persons who are in the power of an adverse Party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or person;

(i) killing or wounding treacherously individuals belonging to the hostile nation or army;

(j) declaring that no quarter will be given;

(k) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(l) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(m) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(n) pillaging a town or place, even when taken by assault;

(o)

Option I

(o) employing the following weapons, projectiles and material and methods of warfare which are calculated to cause superfluous injury or unnecessary suffering:

(i) poison or poisoned weapons,

(ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,

(iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,

(iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,

(v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction;

Option II

(o) employing the following weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering:

(i) poison or poisoned weapons,

(ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,

(iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,

(iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,

(v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development,

Production, Stockpiling and Use of Chemical Weapons and On Their Destruction,

(vi) such other weapons or weapons systems as become the subject of a comprehensive prohibition pursuant to customary or conventional international law;

Option III

(o) employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate;

Option IV

(o)

employing the following weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate:

or

employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate, such as but not limited to:

(i) poison or poisoned weapons,

(ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,

(iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,

(iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,

(v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction,

(vi) nuclear weapons,

(vii) anti-personnel mines,

(viii) blinding laser weapons,

(ix) such other weapons or weapons systems as become the subject of a comprehensive prohibition pursuant to customary or conventional international law;

(p)

Option I

(p) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

Option II

(p) committing outrages upon personal dignity, in particular humiliating and degrading treatment as well as practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity based on racial discrimination;

(p bis) committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(q) utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(r) intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(s) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(t)

Option I

(t) forcing children under the age of fifteen years to take direct part in hostilities.

Option II

(t) recruiting children under the age of fifteen years into armed forces.

Option III

(t) allowing children under the age of fifteen years to take direct part in hostilities.

Option IV

(t)

(i) recruiting children under the age of fifteen years into armed forces or groups; or

(ii) allowing them to take part in hostilities;

Option V

No paragraph (t).

. . .

OPTION I

Sections C and D of this article apply to armed conflicts not of an international character and thus do not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

C. In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(c) taking of hostages;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

D. Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(a)

Option I

(a) intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities;

Option II

No paragraph (a).

(b) intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(c)

Option I

(c) intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

Option II

(c) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

(d) pillaging a town or place, even when taken by assault;

(e) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(e bis) committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(f)

Option I

(f) forcing children under the age of fifteen years to take direct part in hostilities;

Option II

(f) recruiting children under the age of fifteen years into armed forces or groups;

Option III

(f)

(i) recruiting children under the age of fifteen years into armed forces or groups; or

(ii) allowing them to take part in hostilities;

Option IV

No paragraph (f).

(g) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(h) killing or wounding treacherously a combatant adversary;

(i) declaring that no quarter will be given;

(j) subjecting persons who are in the power of another Party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons;

(k) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(l)

Option I

No provision on prohibited weapons.

Option II

A reference to arms, in the light of the discussions on paragraph B(o).

OPTION II

Insert the following provisions in section D:

- intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

- intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment;

- intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated;

- slavery and the slave trade in all their forms;

OPTION III

Delete the chapeau of sections C and D.

OPTION IV

Delete section D.

OPTION V

Delete sections C and D.

* * *

Elsewhere in the Statute:

Option I

The jurisdiction of the Court shall extend to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in article X (war crimes) only when committed as part of a plan or policy or as part of a large-scale commission of such crimes.[2]

Option II

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in article X (war crimes) in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.[2]

Option III

No provision on threshold.

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[2] The view was expressed that the substance and placement of this proposal should be considered.

* * *

Article Y

(relating to the part of the Statute dealing with the definition of crimes)

Without prejudice to the application of the provisions of this Statute, nothing in this part of the Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law.

Annex II

REPORT OF THE WORKING GROUP ON GENERAL PRINCIPLES OF CRIMINAL LAW*

The Working Group recommends to the Preparatory Committee the text of the following articles concerning general principles of criminal law as a first draft for inclusion in the draft consolidated text of a convention for an international criminal court:

Article L. Grounds for excluding criminal responsibility (A/AC.249/1997/WG.2/CRP.7);

Article M. Superior orders and prescription of law (A/AC.249/1997/WG.2/CRP.8);

Article N. [Possible grounds for excluding criminal responsibility specifically referring to war crimes] (ibid.);

Article O. Other grounds for excluding criminal responsibility (ibid.);

Article P. Presumption of innocence (ibid.).

* Incorporating the documents listed in the opening paragraph. The name of the Working Group has been changed from "Working Group on General Principles of Criminal Law and Penalties" as a result of the establishment of a separate Working Group on Penalties (see annex V).

GENERAL PRINCIPLES OF CRIMINAL LAW

Article L

Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility permitted by this Statute,[1] a person is not criminally responsible if at the time of that person's conduct:[2]

(a) the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

[(b) the person is in a state of [involuntary] intoxication [by alcohol, drugs or other means] that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law; [provided, however, that if the person has voluntarily become intoxicated [[with the pre-existing intent to commit the crime] [or knowing that the circumstances would arise that led him or her to commit the crime and that those circumstances could have that effect]],[3] the person shall remain criminally responsible;]

(c) the person [, provided that he or she did not put himself or herself voluntarily into a position causing the situation to which that ground for excluding criminal responsibility would apply,] acts [swiftly and] reasonably [, or in the reasonable belief that force is necessary,] to defend himself or

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[1] This formulation presumes that the grounds for excluding criminal responsibility in 1 (a) through (e) are not the exclusive defences available and that, for example, articles N and O would be retained in some form.

[2] The link between the chapeau of paragraph 1 and paragraph 2 may need to be further considered.

[3] There are two approaches to the question of voluntary intoxication: If it is decided that voluntary intoxication should in no case be an acceptable defence, the text within brackets "[with the pre-existing intent to commit the crime] [or knowing that the circumstances would arise that led him or her to commit the crime and that those circumstances could have that effect]" would have to be deleted. In that case, however, provision should be made for mitigation of punishment with regard to persons who were not able to form a specific intent, where required, towards the crime committed due to their intoxication. If this text were to be retained, the defence would apply in all cases of voluntary intoxication except for those in which the person became intoxicated in order to commit the crime in an intoxicated condition (actio libera in causa). This would probably lead to a great number of war crimes and crimes against humanity going unpunished.

herself or another person [or property] against an [imminent ...[4] use of force] [immediate ...[4] threat of force] [impending ...[4] use of force] and [[unlawful] [and] [unjustified]] use of force in a [not excessive] manner[.] [[not disproportionate] [reasonably proportionate] to the degree of danger to the person [or liberty] [or property] protected];

(d) [the person reasonably believes that][5] there is a threat of [imminent] death or serious bodily harm against that person or another person [or against his or her liberty] [or property or property interests] and the person acts reasonably to avoid this threat, provided that the person's action[6] [causes] [was not intended to cause] [n]either death [n]or a greater harm than the one sought to be avoided;[7] [however, if the person has [knowingly] [recklessly] exposed him or herself to a situation which was likely to lead to the threat, the person shall remain responsible];

(e) [the person reasonably believes that there are][8] [there are] [the person necessarily acts in response to] circumstances beyond that person's control which constitute a [threat of [imminent] death or serious bodily harm] [danger] to that person or another person [or property or property rights][9] and the person acts reasonably to avoid the [threat] [danger], [provided that the person intended to prevent a greater harm [and did not intend to cause] [and did not cause] death][10] and provided that there exists no other way to avoid such threat];

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[4] Dots inserted so as not to repeat "[[unlawful] [and] [unjustified]]" in all three alternatives.

[5] This should be considered together with article K.

[6] A proposal was made to replace the rest of the first sentence by "is under the circumstances not reasonably more excessive than the threat or perceived threat".

[7] A proposal was made to replace "provided that the person's action [causes] [was not intended to cause] [n]either death [n]or a greater harm than the one sought to be avoided" with "employing means which are not disproportionate to the risk faced".

[8] This should be considered together with article K.

[9] It was suggested that a mere reference to the law of necessity would suffice in place of the first part of the sentence.

[10] This applies more to a military situation.

2. The Court may[11] determine the applicability of the grounds for exclusion of criminal responsibility[12] [listed in paragraph 1] [permitted by this Statute] [to the case before it].[13]

Article M

Superior orders and prescription of law

1. The fact that a person's conduct was pursuant to an order of a government or of a superior [whether military or civilian] shall [not] relieve the person of criminal responsibility [[if] [unless] the order [was known to be unlawful or] appeared to be manifestly unlawful].[14]

[The perpetrator of or an accomplice in a crime of genocide [or a crime against humanity] [or a ...] shall not be exempted from criminal responsibility on the sole ground that the person's conduct was pursuant to an order of a government or a superior, or pursuant to national legislation or regulations.][15] [16]

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[11] There was support, in principle, for two proposals regarding application of international law and non-discrimination in the interpretation of general principles of criminal law. The first proposal is to insert, after the word "may" the phrase ", in accordance with international law,". The second proposal is to add the following provision: "The application and interpretation of the general sources of law must be consistent with international human rights standards and the progressive development thereof, which encompasses the prohibition on adverse discrimination of any kind, including discrimination based on gender." These proposals relate to both article 33 of the ILC draft and section 2 of Part 3 bis of the compilation on General Principles of Criminal Law. In order to avoid duplication, discussion could take place in the context of those provisions.

[12] The issue of the extent to which the facts underlying these grounds, for excluding criminal responsibility, if not sufficient to exclude criminal responsibility, should instead be considered in mitigation of punishment will be dealt with in article [47].

[13] The link between the chapeau of paragraph 1 and paragraph 2 may need to be reconsidered.

[14] An unlawful or manifestly unlawful order must be understood as an order in conflict with the rules of international law applicable in armed conflict.

[15] This subparagraph should be considered together with article L, paragraph 2.

[16] For the question of mitigation of punishment, see annex V, sect. B.

[2. Persons who have carried out acts ordered by the Security Council or in accordance with a mandate issued by it shall not be criminally responsible before the Court.][17]

[Article N[18]

Possible grounds for excluding criminal responsibility specifically referring to war crimes]

Article O

Other grounds for excluding criminal responsibility

1. At trial the Court may consider a ground for excluding criminal responsibility not specifically enumerated in this chapter if the ground:

(a) is recognized [in general principles of criminal law common to civilized nations] [in the State with the most significant contacts to the crime] with respect to the type of conduct charged; and

(b) deals with a principle clearly beyond the scope of the grounds for excluding criminal responsibility enumerated in this chapter and is not otherwise inconsistent with those or any other provisions of the Statute.

2. The procedure for asserting such a ground for excluding criminal responsibility shall be set forth in the Rules of the Court.[19]

Article P[20]

Presumption of innocence

Everyone shall be presumed innocent until proved guilty in accordance with law. The onus is on the Prosecutor to establish the guilt of the accused beyond a reasonable doubt.[21]

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[17] There were widespread doubts about the contents and the placement of this paragraph.

[18] It was questioned whether such grounds as military necessity could be dealt with in connection with the definition of war crimes.

[19] This article needs to be further considered together with article L, paragraph 2, and article 33.

[20] Article P is also dealt with in the report of the Working Group on Procedural Matters (see A/AC.249/1997/L.8/Rev.1, annex II, article 40).

[21] Reservations were expressed regarding the phrases "in accordance with law" and "beyond a reasonable doubt" contained in the ILC text.

Annex III

REPORT OF THE WORKING GROUP ON PROCEDURAL MATTERS*

1.** The Working Group recommends to the Preparatory Committee the text of the following articles concerning procedural matters as a first draft for inclusion in the draft consolidated text of the convention for an international criminal court:

Article 26. (A/AC.249/1997/WG.4/CRP.11/Add.1);

Article 26 bis.) Deferral of an investigation by the Prosecutor[1]
) (A/AC.249/1997/WG.4/CRP.11/Add.1);
Article 26 ter.)

Article 28. Arrest (A/AC.249/1997/WG.4/CRP.11 and Corr.1);

Article 29. Pre-trial detention or release (ibid.);

Article 36. Challenges to the jurisdiction of the Court on the admissibility of a case (A/AC.249/1997/WG.4/CRP.11);

Article 44. Evidence (A/AC.249/1997/WG.4/CRP.11/Add.2).

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* Incorporating the documents listed in paragraphs 1, 2 and 3.

** Paragraphs 2 and 3 are on the page following the proposed text for [article 44 ter] below.

[1] Additional discussions to be held at the 16 March-3 April 1998 session of the Preparatory Committee.

[Article 26 bis

1. States Parties shall promptly inform the Prosecutor about national investigations or proceedings undertaken with respect to the alleged commission of a crime within the jurisdiction of the Court. Such information shall be confidential to the extent necessary and shall include a concise statement of the circumstances of the alleged crime, the identity and whereabouts of any suspect (or accused), and the progress of the investigation or proceeding concerned.

2. The Prosecutor shall examine the information received from the State(s) Party(ies) concerned and if he/she believes, having regard to the matters referred to in article 35, that the conditions exist for having the Court entertain the case, shall seek a ruling from the Pre-Trial Chamber and inform of his/her decision the State(s) Party(ies) concerned and the suspect (or accused). The Prosecutor may also request the State(s) Party(ies) concerned to provide additional information about the national investigation or proceeding within a given time, and defer a decision until he/she has examined such additional information.

3. The States Parties to the present Statute undertake to submit periodical reports to the Prosecutor on the measures they have adopted which give effect to the prosecution of crimes falling within the jurisdiction of the Court.]

[Article 26 ter

Deferral of an investigation by the Prosecutor

1. In the event that the Prosecutor, having regard to the matters in article 35, defers an investigation, then the Prosecutor [may request that] [may seek an order of the Court that] the relevant State make available to the [Prosecutor] [Court] information on the proceedings.[2]

2. Any information so provided will, to the extent necessary, be kept confidential.

3. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State in respect of whose proceedings deferral has taken place.]

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[2] The term "proceedings" covers both investigations and prosecutions (see A/AC.249/1997/L.8/Rev.1, annex I, article 35, note 24).

Article 28

Arrest

1. At any time after an investigation has been initiated, the [Presidency] [Pre-Trial Chamber] may at the request of the Prosecutor issue a warrant for the pre-indictment arrest of a suspect if there are reasonable grounds[3] [4] to believe that:

(a) the suspect has committed a crime within the jurisdiction of the Court; and

(b) taking the suspect into custody is necessary to ensure that the suspect does not:

(i) fail to appear for trial;

[(ii) [interfere with or destroy evidence;][5]

[(iii) [intimidate] [influence] witnesses or victims;]

[(iv) engage in collusion with accomplices;] or

[(v) [continue to commit a crime within the jurisdiction of the Court.][6]

[The Pre-Trial Chamber may also issue a warrant of judicial supervision in order to place a person under restrictions of liberty other than arrest.][7]

[No person shall be subjected to arbitrary arrest or detention. Nor shall any person be deprived of his liberty except on such grounds and in accordance with such procedures as are established by the rules of the Court.][8]

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[3] The term "reasonable grounds" was understood to embody objective criteria.

[4] Some delegations preferred other terms such as "serious reasons".

[5] Some delegations suggested that subparagraphs (ii), (iii) and (iv) could be merged under a more general formulation such as "obstructing or endangering the investigation or the court proceedings".

[6] Some delegations favoured addressing situations in which the accused may be harmed or at risk. Other delegations stated that the accused could be adequately protected under article 43.

[7] It was suggested that this provision could be deleted because it is addressed in article 29, paragraph 5.

[8] It was suggested that this provision could be moved to article 26, paragraph 6.

2. [a] The warrant for the pre-indictment arrest shall be deemed to have lapsed and the request for the pre-indictment arrest of a suspect shall be deemed to have been withdrawn if [the indictment has not been confirmed] [a post-indictment warrant has not been served] within [30] '60] [90] days of the arrest, or in exceptional circumstances such longer time up to a total of [60] [90] days as the [Presidency] [Pre-Trial Chamber] may allow.

[b] In the case of a State Party which has notified the court under article 53 bis (1 bis) that it can surrender pre-indictment, the warrant for the pre-indictment arrest of a suspect shall be deemed to have been withdrawn if [the indictment has not been confirmed] [a post-indictment warrant has not been confirmed] [a post-indictment warrant has not been served] within [30] [60] [90] days of the surrender, or in exceptional circumstances such longer time up to a total of [60] [90] days as the [Presidency] [Pre-Trial Chamber] may allow.

If the Prosecutor decides not to indict the suspect or the [Presidency] [Pre-Trial Chamber] decides not to [confirm the indictment] [not to issue a post-indictment warrant], the Prosecutor shall immediately advise the custodial State of that fact.[9]

3. [In the case where no pre-indictment warrant has been obtained,] [Prior to the confirmation hearing,] [As soon as practicable] [after the confirmation of the indictment], the Prosecutor shall seek from the Presidency [Pre-Trial Chamber] a [post-indictment] warrant for the arrest and transfer of the accused. The Presidency [Pre-Trial Chamber] shall issue such a warrant unless it is satisfied that:

[Optional chapeau to paragraph 3]

[Upon confirmation of the indictment, a warrant for the arrest of the accused shall be issued by the Pre-Trial Chamber, unless, having heard the views of the Prosecutor, it is satisfied that:]

(a) the accused will voluntarily appear for trial and none of the other factors in paragraph 1 (b) are present]; or

(b) there are special circumstances making it unnecessary for the time being to issue the warrant.

4. The Court[10] shall transmit the warrant to any State where the person may be located, along with a request for the provisional arrest, or arrest and [surrender, transfer, extradition] of the person under part 7.

5. [Pre-indictment and post-indictment warrants may also be issued when the accused is a fugitive. In this case, the post-indictment warrant issued by the

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[9] It was suggested that the questions of release and re-arrest could be addressed in another provision of this Statute.

[10] The term "Court" is understood to include its constituent organs, including the Prosecutor, as defined in article 5.

Pre-Trial Chamber shall have the effect of an international warrant and shall be disseminated by all appropriate means. When the accused is apprehended, the authorities shall proceed as provided for in part 7.]

6. [A post-indictment warrant shall remain in effect until the date of the judgement. The effects of the warrant delivered by the Pre-Trial Chamber shall not be interrupted by the actions challenging the submission of cases to the Court.]

Article 29

Pre-trial detention or release

1. [The States [Parties] [in which the person is located] [and in which the crime was committed] shall be notified of a warrant issued by the Pre-Trial Chamber.] The State that has received a pre- or post-indictment warrant and a request for the arrest of a person under article 28 (5) shall immediately [in accordance with its laws][11] [[and] in accordance with the provisions of part 7 of this Statute] take steps to arrest the suspect [on the basis of the warrant issued by the Court or by obtaining a domestic warrant for arrest based on the Court's warrant and request].[12]

[1 bis. The Prosecutor may, with the consent of the Pre-Trial Chamber, execute a warrant for arrest by him or herself only in cases where the competent authority of the State Party concerned may not be available or may be ineffective.][13]

2. A person arrested shall be brought promptly before a competent judicial authority in the custodial State who shall determine, in accordance with the law of that State, that the warrant applies to that person and the person has been arrested in accordance with the proper process and that the person's rights have been respected.

3. The person shall have the right to apply to [the competent judicial authority in the custodial State] [the Pre-Trial Chamber] for interim release pending [surrender] [transfer] [extradition] [in accordance with its national law]. [The custodial State shall take into account the views of the Prosecutor [and Court] on interim release.]

4. After the [decision to] [surrender] [transfer] [extradite] to the Court, the person may apply to the [Presidency] [Pretrial Chamber] for interim release pending trial.

5. The person shall be detained unless the [Presidency] [Pre-Trial Chamber] is satisfied that the person will voluntarily appear for trial and none of the

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[11] Under article 28 (5), a warrant for pre-indictment arrest is forwarded to the State in which the individual sought may be located, along with a request for provisional arrest or transfer/surrender under part 7. If part 7 specifies the extent to which national laws apply to requests for provisional arrest or transfer/surrender, it will be unnecessary to treat this issue here as well.

[12] The issue of whether a State can decline to arrest and detain a person, pending resolution of a challenge under article 36, could be dealt with in that article.

[13] This provision raises a host of issues, including under what conditions the Prosecutor should be able to exercise such authority, whether the Prosecutor would have adequate resources to do so, and whether such issues should be addressed elsewhere in the Statute.

other factors in article 28 (1) (b) are present. If it decides to release the person, it may do so with or without conditions [or may issue a warrant of judicial supervision restricting the person's liberty other than by arrest]. [The [Presidency] [Pre-Trial Chamber] shall also, on its own initiative, review its ruling periodically. If satisfied that changed circumstances require that the ruling be modified, it may order any measure provided for in paragraph 4.]

6. (a) The [Presidency] [Pre-Trial Chamber] may, either of its own initiative or at the request of the person concerned or the Prosecutor, modify its ruling as to detention[, judicial supervision] or conditional release in effect at that time.

[(b) The person may be detained prior to trial for a maximum of one year; however, this period may be extended up to an additional year by the [Presidency] [Pre-Trial Chamber] if the Prosecutor can demonstrate that he or she will be ready for trial within that period and can show good cause for the delay.]

(c) The person and the Prosecutor may appeal the [Presidency's] [Pretrial Chamber's] determination regarding release or detention to the Appeals Chamber.

7. If necessary, the [Presidency] [Pre-Trial Chamber] may issue a warrant of arrest to secure the presence of an accused who has been released.

8. A person arrested may apply to the [Presidency] [Pre-Trial Chamber] for a determination of the lawfulness under this Statute of any arrest warrant or order of detention issued by the Court. If the Presidency [Pre-Trial Chamber] decides that the arrest or detention was unlawful under the Statute, it shall order the release of the person, [and may award compensation] [in accordance with article ...].[14]

9. [A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held, or if necessary in the host State.] [Once ordered [surrendered] [transferred] [extradited] by the custodial State, the person shall be delivered to the Court as soon as possible, and shall be held in an appropriate place of detention in the host State or other State in which the trial is to be held.]

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[14] A number of issues were raised regarding compensation, including whether it should be mandatory or discretionary, whether it should be granted even when the Prosecutor acted in good faith, whether such determination is not appropriate until the judgement becomes final and whether granting compensation may prevent the Prosecutor from diligently carrying out his or her duties.

Article 36

Challenges to the jurisdiction of the Court or the admissibility of a case

1. At all stages of the proceedings, the Court (a) shall satisfy itself as to its jurisdiction over a case pursuant to article 24 and (b) may, on its own motion, determine the admissibility of the case pursuant to article 35.[15]

2. Challenges to the admissibility of the case, pursuant to article 35, or challenges to the jurisdiction of the Court may be made by:

(a) an accused [or a suspect];[16]

(b) [A State] [[An interested] State Party] which has jurisdiction over the crime on the ground that it is investigating or prosecuting the case or has investigated or prosecuted[17]

[a State [State Party] of nationality of a person referred to in paragraph 2 (a) [on the ground that it is investigating or prosecuting the case or has investigated or prosecuted]]

[and a State [State Party] which has received a request for cooperation];

The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility.

In proceedings with respect to jurisdiction or admissibility, those having submitted the case pursuant to article 21,[18] [those non-State parties which have jurisdiction over the crimes][19] as well as victims, may also submit observations to the Court.

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[15] In the light of the wording to be adopted for article 36, several draft provisions of the statute may have to be reexamined including article 26, paragraph 4, and article 27, paragraph 2 (b).

[16] The term "suspect" includes a person who is the subject to an investigation. Another option is to limit the right to challenge to a suspect arrested on the basis of a pre-indictment arrest warrant.

[17] The final wording of this subparagraph will depend on the content of article 35.

[18] The final wording will depend on the content of article 21 (States, Security Council, Prosecutor).

[19] This provision would apply to the option where only States parties can challenge the jurisdiction of the Court or the admissibility of a case.

3.[20] The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2.

The challenge must take place prior to or at the commencement of the trial.

In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.

Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court as provided in the preceding subparagraph, may only be based on article 35, paragraph 2 (c).[21]

3 bis. A State referred to in paragraph 2 (b) of the present article shall make a challenge at the earliest opportunity.[22]

4. Prior to the confirmation of the indictment, challenges to the admissibility of a case or challenges to the jurisdiction of the Court, shall be referred to the Pre-Trial Chamber. After confirmation of the indictment, they shall be referred to the Trial Chamber.

Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber.[23] [24]

[5. If the Court has decided that a case is inadmissible pursuant to article 35, the Prosecutor, may, at any time, submit a request for a review of the decision, on the grounds that conditions required under article 35 to render the case inadmissible no longer exist or that new facts arose.]

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[20] It was suggested that if several States have jurisdiction over a case and one of those States has already challenged the jurisdiction of the Court, the remaining States should not bring additional challenges except on different grounds.

[21] The final wording of this subparagraph will depend on the content of article 35.

[22] The question arises as to what consequences, if any, should flow from the failure of a State to make a timely challenge.

[23] Subject to the final decision or the organization of the Court.

[24] The question concerning the suspension of the trial proceeding in case of appeal should be addressed in the Rules of Procedure.

Article 44

Evidence

1. Before testifying, each witness shall, in accordance with [or as excepted by] the Rules, give an undertaking as to the truthfulness of the evidence to be given by that witness.[25]

1. bis The testimony of witness at trial shall be given in person, except to the extent provided by the measures set forth in article 43 or in the rules of evidence. These measures shall not be [prejudicial to] [inconsistent with] the rights of the accused.[26] [27]

Note: There was no time to discuss in the Working Group the remaining paragraphs of draft article 44 which follow:

3. **[The Court has the authority and duty to call all evidence that it considers necessary for the determination of the truth.]**[28] **[It]** The Court may **[also]** require to be informed of the nature of any evidence before it is offered so that it may rule on its relevance or admissibility **[after hearing the parties to the case]. [The Court may base its decision only on evidence submitted and discussed before it at the trial.]**[29]

4. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.[30]

5. Evidence obtained by means of a serious violation of this Statute or of other rules of international law **[or by means which cast substantial doubt on its reliability] [or whose admission is antithetical to, and would seriously damage, the integrity of the proceedings] [or by means which constitute a**

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[25] Many delegations were of the view that the subject matter of this paragraph was more appropriate to be dealt with in the Rules of Procedure.

[26] It was suggested that article 43 could be drafted in a more detailed or descriptive manner.

[27] Some delegations expressed their concern about the possibility of allowing witnesses to testify without revealing personal data.

[28] This provision is meant to indicate that the relevant evidence cannot be determined by the parties alone, but has also to be determined by the Court's evaluation of the necessary depth of investigation and determination of the facts. This is, of course, basically a civil law concept, but delegations should bear in mind the additional historical dimension and truth-finding mission of the Court.

[29] These provisions might be better placed in article 45.

[30] It was questioned whether this provision was strictly necessary.

serious violation of internationally protected human rights] [or which have been collected in violation of the rights of the defence] shall not be admissible.[31]

[With regard to defences open to the accused under the general principles of criminal law in this Statute, the onus of proof shall be on the accused, subject to a preponderance of probability as applicable in civil cases.][32]

[6. The Court has, in case of evidence obtained by national authorities, to presume irrebuttably that the national authorities acted in accordance with the domestic provisions. The Rules of Court shall address the admissible motions against this presumption.]

Article 44 bis[33]

Offences against the integrity of the Court

1. The Court shall have jurisdiction over the following offences against the integrity of the Court:

(a) perjury committed during the course of its proceedings;

(b) influencing, impeding or retaliating against officials of the Court;

(c) obstructing the functions of the Court; and

(d) contempt committed during the course of its proceedings.

2. The Court may impose a term of imprisonment not exceeding [X months/years] [or a fine, or both].

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[31] This is an attempt to merge the additional proposals (paragraph 5, subparagraphs 2 to 5) concerning the admissibility of evidence with the ILC draft. It was felt that it would be better to refer to "rules of international law" than to single out the International Covenant on Civil and Political Rights, although this will of course be the main focus of this rule. The formula "internationally protected human rights" is intended to cover non-treaty standards as well and would therefore be broader than "international law".

[32] Such a provision might be better placed either under article 40 or in the context of "Defences" in the part dealing with general principles of criminal law.

[33] Delegations favoured the options that the Court shall have jurisdiction over offences against its integrity but the precise formulation of this article must be further reflected upon. There was a view that these offences required further definition in the Statute. Some previous proposals in this respect may be found on pages 44 to 46 of the abbreviated compilation of August 1997.

3. The offences referred to in this article shall be tried before a Chamber other than the Chamber in which the alleged offences were committed. The rules shall determine the applicable procedure for these offences.

Note: There was no time to discuss in the Working Group the following formulation:

[Article 44 ter[34]

1. Any person heard or examined by the Trial Chamber may invoke restrictions provided for in his national law and designed to prevent the disclosure of confidential information connected with national defence or national security.

2. The Trial Chamber may ask the State of which the persons being heard or examined are nationals whether it confirms their claim to be bound to secrecy.

If the State confirms to the Trial Chamber that an obligation of secrecy exists, the Chamber shall note this fact.

3. The provisions of the preceding paragraphs shall also apply to execution of a request for judicial assistance made under Part 7 of this Statute.]

[34] The issues addressed here have also been addressed by a number of proposals on different articles in the procedural part of the Statute.

2. The Working Group also recommends that its deliberations at the 16 March-3 April 1998 session of the Preparatory Committee be centred around the following provisions:

Articles 26 bis and 26 ter (additional discussions) (see above);

Article 44 (remaining paragraphs); 44 bis (additional discussions) and 44 ter (see above);

Article 45)
Article 48) (see below)
Article 49)
Article 50)

3. In order to facilitate the Working Group's deliberations at its next session, individual delegations presented draft revised abbreviated compilations on articles 45, 48 and 50, reproduced below. Also reproduced below is the text of article 49, which was not the subject of a draft revised abbreviated compilation even though it was introduced in the Working Group. Its text comes from the abbreviated compilation of August 1996.

Article 45

Quorum and judgement[35] [36]

1. A quorum consists of [at least four] (all) members of the Trial Chamber. [The judgement shall be given only by judges who have been present at each stage of the trial before the Trial Chamber and throughout its deliberations.]

[1 bis [The Trial Chamber's judgement shall be based on its evaluation of the evidence and the entire proceedings.] [The judgement shall not exceed the facts and circumstances described in the indictment or its amendment, if any.]][37]

2.

Option 1
The decision [judgement] shall be taken by a majority [at least three] of the judges.

Option 2
All judges must concur in a decision as to conviction [or acquittal] and at least three judges must concur as to the sentence to be imposed.

Option 3
All judges must concur in a decision as to conviction [or acquittal] as well as to the sentence to be imposed.

3.[38]

Option 1

If after a sufficient time for deliberation a Chamber which has been reduced to four judges is unable to agree on a decision, it may order a new trial.

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[35] The present text was put forward by individual delegations in order to simplify the existing text and to show more clearly which are the various options. The proposal does not constitute as such a new substantive proposal.

[36] Throughout this article, "Court" has been replaced with "Trial Chamber". Decisions by the Pre-Trial Chamber (as well as its composition) and by the Appeals Chamber are dealt with elsewhere. Furthermore, it is questionable whether this article should only address judgements or whether it should also cover other (procedural) decisions. As currently drafted, it only deals with judgements.

[37] This is a new paragraph addressing two proposals which are moved here from article 45(5) in the abbreviated compilation and from the revised article 44(3).

[38] This paragraph would only be necessary if majority decisions are allowed and a quorum could consist of an even number of judges.

Option 2

If the required majority for a decision as to conviction or the sentence to be imposed cannot be reached, the opinion which is more favourable to the accused shall prevail.

[3 bis. The Trial Chamber shall pronounce its findings separately for each charge in the indictment. If several accused are tried together, the Chamber shall rule separately on the case of each of them.]

4. The deliberations of the Trial Chamber shall remain secret [confidential].

5. The judgement shall be in writing and shall contain a full and reasoned statement of the findings [on the evidence] and conclusions. It shall be the sole judgement issued [It may contain dissenting opinions], and shall be delivered in open court.

Article 48

Appeal against judgement or sentence[39]

1. A decision [conviction] under article 45 may be appealed [to the Appeals Chamber], in accordance with the Rules, as provided for below:

(a) The Prosecutor may make such an appeal [without any specified grounds] on the following grounds:

(i) procedural error,
(ii) error of fact, or
(iii) error of law;

(b) The convicted person may make such an appeal [without any specified grounds] on the following grounds:

(i) procedural error,
(ii) error of fact, or
(iii) error of law.

1 bis. A decision [sentence] under article 47 may be appealed [to the Appeals Chamber], in accordance with the Rules, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence. [In the case of an appeal of sentence, the Appeals Chamber may also render a decision on conviction.]

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[39] The present text was put forward by individual delegations in order to simplify the existing text and to show more clearly which are the various options. The proposal does not as such constitute a new substantive proposal.

1 ter.

Option 1

The Prosecutor or the convicted person may, in accordance with the Rules, appeal [to the Appeals Chamber] against a decision rendered in absentia under article 37.

Option 2

The Prosecutor or the convicted person may not appeal against a decision rendered in absentia under article 37 except that an appeal against judgement given on the merits in the absence of the accused shall be allowed if the accused accepts the judgment or was represented during the trial before the Trial Chamber by defence counsel appointed by the accused.

2. Unless the Trial Chamber otherwise orders, a convicted person shall remain in custody pending an appeal.

[2 bis. In case of an acquittal, the accused shall be released immediately.

If, at the time the judgement is pronounced, the Prosecutor advises the Trial Chamber in open court of his or her intention to file notice of appeal, the Trial Chamber may, at the request of the Prosecutor, issue a warrant for the arrest of the acquitted person to take effect immediately.

The Trial Chamber shall not issue an arrest warrant unless it is satisfied that the acquitted person may not be readily returned to custody if judgement is reversed.]

[Option to 2 bis:

(a) If the accused is acquitted, sentenced to payment of a fine or sentenced to a term of imprisonment already covered by the period in detention, the accused shall be released immediately unless he is retained for another case by the organs of the Court or by the judicial authorities of a State Party.

(b) In all other cases, the Trial Chamber may, if the circumstances justify prolongation of a measure of security, by a special reasoned decision, maintain the detention of the accused. In this case, so long as the judgement is not final and during appeal proceedings, if any, the convicted person shall remain in detention until such time as the period of detention equals the sentence handed down. However, the convicted person has the right to challenge custody by appealing at any time.[40]

[3. The sentence shall begin to run from the day it is pronounced. However, as soon as notice of appeal is given, the enforcement of the judgement shall thereupon be stayed until the decision on appeal has been delivered, the convicted person meanwhile remaining in detention.

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[40] This provision appears on page 224 under H of the Report, vol. II.

If, by a previous decision of the Trial Chamber, the convicted person has been released, or is for any other reason at liberty, and he or she is not present when the Judgement is pronounced, the Trial Chamber shall issue a warrant for his or her arrest.

Execution of the judgement shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.][41]

[4. The Appeals Chamber may hear interlocutory appeals on the grounds provided for in article 38.]

Article 49

Proceedings on appeal[42]

1. The Appeals Chamber has all the powers of the Trial Chamber.

[The Rules of Procedure and Evidence that govern proceedings in the Trial Chambers shall apply mutatis mutandis to proceedings in the Appeals Chamber.]
[The Rules of Procedure and Evidence that govern proceedings in the Trial Chambers shall apply mutatis mutandis to proceedings provided by the preceding two paragraphs. Further rules that govern those proceedings shall be provided for in the Rules of Court.]

[On the motion of a party, the Appeals Chamber may authorise the presentation of new evidence, which was not available at the time of trial, if it considers that the interests of justice so require.][43]

2. If the Appeals Chamber finds that the proceedings appealed from were unfair or that the decision is vitiated by error of fact or law, it may:

(a) if the appeal is brought by the convicted person, reverse or amend the decision, or, if necessary, order a new trial;

(b) if the appeal is brought by the Prosecutor against an acquittal, order a new trial.

[Those defenses shall only be admissible if already raised in the Trial Chamber or if resulting from the proceedings in that Chamber]

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[41] Report, vol. II, p. 236. These matters could instead be addressed in article 47.

[42] The text of article 49 was not the subject of a draft revised abbreviated compilation even though it was introduced in the Working Group. Its text comes from the abbreviated compilation of August 1996.

[43] Report, vol. II, reformulation of article N, p. 242.

3. If in an appeal against sentence the Chamber finds that the sentence is manifestly disproportionate to the crime, it may vary the sentence in accordance with article 47.

4. The decision of the Chamber shall be taken by a majority of the judges, and shall be delivered in open court [**on a date of which notice has been given to the parties and counsel and at which they shall be entitled to be present**]. Six judges constitute a quorum.

[The Appeals Chamber shall pronounce judgement on the basis of the record on appeal together with such additional evidence as it has authorized.

[The judgement shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.]

[The Appeals Chamber may rule only on objections formulated by the parties in their appeals. When the decision has been appealed only by the accused, it cannot be amended to his or her detriment.]

5. Subject to article 50, the decision of the Chamber shall be final.

[6. A sentence pronounced by the Appeals Chamber shall be enforced immediately.]

[7. Where the accused is not present when the judgement is due to be delivered, either as having been acquitted on all charges or for any other reason, the Appeals Chamber may deliver its Judgement in the absence of the accused and shall, unless it pronounces his or her acquittal, order his or her arrest or surrender to the Tribunal.]

Note: Paragraph 5 of page 238 of the Report, vol. II, is reproduced in the August 1997 abbreviated compilation under article 43 (other proposals).

Note: Proposals A to M and O on pages 238 to 242 of the Report, vol. II, deal with matters which could be better addressed in the Rules of Court.

Note: The issue of interlocutory appeals is addressed in a proposal made under article 38 (see paras. (e) and (f)). (August 1997 abbreviated compilation).

Article 50

Revision[44]

1. The convicted person [and, after his or her death, his spouse, her husband, his or her children, relatives or any persons having express instructions] or

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[44] The present text was put forward by individual delegations in order to simplify the existing text and to show more clearly which are the various options. The proposal does not constitute as such a new substantive proposal.

the Prosecutor may, in accordance with the Rules, apply to the Presidency [Court which rendered the original judgement] for revision of a conviction [final judgement in a criminal case][45] on the following grounds:

(a) that evidence has been discovered which was not available to the applicant at the time the conviction [final judgement] was pronounced or affirmed and which could have been a decisive factor in the conviction;

[(b) it is proved that decisive evidence which was taken into account when passing the conviction does not possess the value which had been assigned to it because it is false, invalid, or has been forged or falsified;

(c) it is proved that one or more of the judges who participated in a conviction or in its confirmation has committed in that case a serious breach of his or her duties;

(d) a previous judgement on which the conviction was based has been annulled;

(e) a more benign penal law than the one applied in the sentence becomes retroactively applicable].

2. [[The Presidency] shall reject the application if it considers it unfounded] if the Presidency [Court which rendered the original judgement] is of the view that the new evidence could lead to the revision of the conviction [considers there are valid grounds for the application], it may:

(a) reconvene the Trial Chamber;

(b) constitute a new Trial Chamber; or

(c) refer the matter to the Appeals Chamber,

with a view to the Chamber determining, after hearing the parties, whether the new evidence should lead to a revision of the conviction.

[Option to (a)-(c): It shall annul the conviction and refer the accused to a Chamber at the same level as, but having a composition different from, that of the Chamber which handed down the annulled decision.]

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[45] Apparently, the suggested modification implies that an acquittal would also allow an application for revision from the Prosecutor; this would represent a drastic change from the concept of revision adopted by the ILC draft.

Annex IV

REPORT OF THE WORKING GROUP ON INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE*

The Working Group recommends to the Preparatory Committee the text of the following articles concerning international cooperation and judicial assistance as a first draft for inclusion in the draft consolidated text of the convention for an international criminal court:

Article 51. [General obligation to cooperate] (A/AC.249/1997/WG.5/CRP.2 and Corr.1);

Article 52. [Requests for cooperation: General provisions] (ibid.);

Article 53. [Surrender] [Transfer] [Extradition] of persons to the Court (A/AC.249/1997/WG.5/CRP.2/Add.1);

Article 53 bis. [Contents of request for [surrender] [transfer] [extradition] (ibid.);

Article 54. Provisional arrest (ibid.);

Article 55. Other forms of cooperation [and judicial and legal [mutual] assistance] (A/AC.249/1997/WG.5/CRP.2/Add.2);

Article 56. Execution of requests under article 55 (ibid.);

Article 57. Rule of speciality (ibid.);

Article 58. General obligation regarding recognition [and enforcement] of judgements (A/AC.249/1997/WG.5/CRP.2/Add.3);

Article 59. Role of States in enforcement of sentences [and supervision] of sentences of imprisonment (ibid.);

Article 59 bis. Limitation of prosecution/punishment for other offences (ibid.);

Article 59 ter. Enforcement of fines and forfeiture measures (ibid.);

Article 60. [Pardon,] parole and commutation of sentences [early release] (ibid.);

Article 60 bis. Escape (ibid.).

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* Incorporating the documents listed in the opening paragraph.

PART 7. [INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE]

Article 51

[General obligation to cooperate][1]

States Parties shall, in accordance with the provisions of this [Part] [Statute], fully cooperate with the Court[2] in its investigation and prosecution of crimes under this Statute. States Parties shall so cooperate without [undue] delay.

Article 52[3]

[Requests for cooperation: general provisions]

1. Authorities competent to make and receive requests/Channels for communication of requests

(a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, accession or approval.

Such designation and subsequent changes shall be done in accordance with the Rules of Procedure.

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[1] It was suggested that there was no need for titles.

[2] "Court" is understood to include its constituent organs, including the Prosecutor, as defined in article 5. Such a provision could be inserted elsewhere in the Statute.

[3] It was suggested that the provisions of article 53 bis, paragraph 3, and article 55, paragraph 7, concerning the protection of witnesses and victims should be combined in a single paragraph in article 52, which would read:

> "The Court may withhold, in accordance with article 43, from the requested State [or a State making a request to the Court under article 55 (6)], specific information about any victims, potential witnesses and their families if it considers that this is necessary to ensure their safety or physical and psychological well-being. Any information that is made available to a State under this part shall be provided and handled in a manner that protects the safety or physical or psychological well-being of any victims, potential witnesses or their families."

It was also suggested that the content of such a provision should be considered further.

(b) When appropriate, without prejudice to the provisions of paragraph 1 (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Language of requests[4]

Requests for cooperation [and supporting documents] shall be [either] in [an official language of the requested State [unless otherwise agreed]] [or in] [one of the working languages reflected in article 18, in accordance with the choice made by that State upon ratification, accession or approval].

[The legal effect of such request shall not be diminished if any supporting document is not in such working language provided that a brief summary of any such document in that working language is also submitted.]

3. Confidentiality of requests from the Court

The requested State shall keep confidential a request and any supporting documents, except to the extent that the disclosure is necessary for execution of the request.

4. Cooperation by non-States Parties[5]

[(a) The Court may [call on] [invite] any State not party to this Statute to provide assistance under this part on the basis of [comity], an ad hoc arrangement, an agreement with such State [or any other appropriate basis].]

[(b) Where a State not party to this Statute [which has entered into an ad hoc arrangement or an agreement with the Court[6]], fails to cooperate with requests under paragraph (a), thereby preventing the Court from performing its duties under this Statute, the Court may make a finding to that effect and refer the matter to [the Council of States Parties[7]] [or] [the United Nations General Assembly] [or, where the Security Council referred the matter to the Court,] [to the Security Council] [so that necessary measures may be taken to enable the Court to exercise its jurisdiction].[8]]

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[4] The language to be used by States in their replies to the Court is dealt with under article 56.

[5] It was suggested that the issue of non-States Parties should be addressed in a separate article 51 bis.

[6] It was suggested that a reference to paragraph (a) would cover this concern.

[7] It was suggested that the referral be made to a standing committee of the Council of States Parties. This issue needs to be further addressed in the organization of the Court.

[8] The question of "necessary measures" has to be further examined.

5. Cooperation of intergovernmental organizations

The Court may ask any intergovernmental organizations to provide information or documents. The Court may also ask for other forms of cooperation and assistance as may be agreed upon with such organizations and in accordance with their respective competencies and/or mandates.

6. States Parties' failure to cooperate [comply][9]

Where a State Party fails to comply with a request by the Court contrary to the provisions of the Statute, thereby preventing the Court from performing its duties under this Statute, the Court may make a finding to that effect and refer the matter to [the Council of States Parties[10]] [or] [the United Nations General Assembly] [or, where the Security Council referred the matter to the Court] [to the Security Council] [so that necessary measures may be taken to enable the Court to exercise its jurisdiction].[11]

Article 53

[Surrender] [Transfer] [Extradition] of persons[12] to the court

1. The Court[13] may transmit a request for the arrest and [surrender] [transfer] [extradition] of a person, along with the supporting material outlined in article 53 bis, to any State on the territory of which that person may be found, and shall request the cooperation of that State in the arrest and [surrender] [transfer] [extradition] of such person. States Parties shall, in accordance with the provisions of this Part [and the procedure under their national law], comply with requests for arrest and [surrender] [transfer] [extradition] without [undue] delay.

[1 bis. The national law of a requested State shall govern the conditions [procedure] for granting or denying a request for [surrender] [transfer] [extradition] [except as otherwise provided in this Part].]

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[9] It was suggested that this paragraph should be inserted in article 51.

[10] It was suggested that the referral be made to a standing committee of the Council of States Parties. This issue needs to be further addressed in the organization of the Court.

[11] The question of "necessary measures" has to be further examined.

[12] The term "persons" is understood to include "suspects", "accused" and "convicted persons". [The term "suspect" means a person who is the subject of a pre-indictment arrest warrant.]

[13] The term "Court" is understood to include its constituent organs, including the Prosecutor, as defined in article 5. Such a provision could be inserted elsewhere in the Statute.

2.

[Option 1: No grounds for refusal.]

[Option 2: A State Party may deny a request for [surrender] [transfer] [extradition] only if:[14]

(a) with respect to a crime under [article 20 (b) through (e)] [article 20 (e)], it has not accepted the jurisdiction of the Court;

[(b) the person is a national of the requested State;][15]

(c) the person has been investigated or has been proceeded against, convicted or acquitted in the requested State or another State for the offence for which his [surrender] [transfer] [extradition] is sought [, except that a request may not be denied if the Court has determined that the case is admissible under article 35];

[(d) the information submitted in support of the request does not meet the minimum evidentiary requirements of the requested State, as set forth in article 53 bis, paragraph 1 (c);]

(e) compliance with the request would put it in breach of an existing obligation that arises from [a peremptory norm of] general international law [treaty] obligation undertaken to another State.][16]

[2 bis. If a request for [surrender] [transfer] [extradition] is denied, the requested State Party shall promptly inform the Court of the reasons for such denial.]

3. Application to the Court to set aside [surrender] [transfer] [extradition]

A State Party [having received a request under paragraph 1 may, in accordance with the Rules[17]] [may, in [...] days of receiving a request under

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[14] There is no agreement on the list of grounds contained in this option.

[15] It was suggested that even if a person is a national of the requested State, this does not prevent that State from [transferring] [surrendering] the person to the Court if the latter guarantees that the national in question shall be returned to the requested State to serve the sentence pronounced by the Court (cf. article 59 (1)).

[16] It was suggested that the following ground for refusal should be included: when the imposition or the execution of punishment for the offence for which surrender is requested would be barred by reasons prescribed under the law of the requested State if the requested State were to have jurisdiction over the offence.

[17] Questions dealing with the consequences of lapse of time will be addressed in the Rules.

paragraph 1], file a written application with the Court to [set aside] [withdraw] the request on specified grounds [including those mentioned in articles 35 and 42]. Pending a decision of the Court on the application, the State concerned may delay complying with the request but shall take appropriate measures [as may be available] to ensure the compliance with the request after a decision of the Court to reject the application.

4. Parallel requests from the Court and State(s)

Option 1

(a) A State Party [which has accepted the jurisdiction of the Court] [, if it is a party to the treaty covered by [article 20 (e)] with respect to the crime,] shall [, as far as possible,] give priority to a request from the Court under paragraph 1 over requests for extradition from other States [Parties].

(b) If the requested State also receives a request from a non-State Party to which it is bound by an extradition agreement for the extradition of the same person, either for the same offence or for a different offence for which the Court is seeking the person's [surrender] [transfer] [extradition], the requested State shall determine whether to [surrender] [transfer] [extradite] the person to the Court or to extradite the person to the State. In making its decision the requested State shall consider all relevant factors, including but not limited to:

(i) the respective dates of the requests;

(ii) if the offences are different, the nature and gravity of the offences;

(iii) the interests of the State requesting extradition, including, where relevant, whether the offence was committed in its territory and the nationality of the victims of the offence; and

(iv) the possibility of subsequent [surrender] [transfer] [extradition] or extradition between the Court and the State requesting extradition.

Option 2

(a) If the requested State also receives a request from a [State] [State Party] [to which it is bound by an extradition agreement] for the extradition of the same person, either for the same offence or for a different offence for which the Court is seeking the person's [surrender] [transfer] [extradition], the appropriate authority of the requested State shall determine whether to [surrender] [transfer] [extradite] the person to the Court or to extradite the person to the State. In making its decision the requested State shall consider all relevant factors, including but not limited to:

(i) whether the extradition request was made pursuant to a treaty;

(ii) the respective dates of the requests;

(iii) if the offences are different, the nature and gravity of the offences;

(iv) the interests of the State requesting extradition, including, where relevant, whether the offence was committed in its territory and the nationality of the victims of the offence; and

(v) the possibility of subsequent [surrender] [transfer] or extradition between the Court and the State requesting extradition.

(b) The requested State may not, however, deny a request for the [surrender] [transfer] [extradition] made under this article in deference to another State's request for extradition of the same person for the same offence if the State requesting extradition is a State Party and the Court has ruled the case before it is admissible, and its decision took into consideration the proceedings in that State which gave rise to its extradition request.

Option 3

(a) Subject to paragraph (b), a State Party [shall] [may] accord priority to a request by a State over a request by the Court for the extradition, transfer or surrender of a person to the requesting State under the provisions of any existing bilateral or multilateral agreement.

(b) A State Party shall however accord priority to requests from the Court over a request by a State where the Court has [positively] determined pursuant to article ___ that the requesting State is unwilling or unable genuinely to carry out the investigation or prosecution of the case for which extradition, transfer or surrender is sought.

[5. Proceeding in requested State

Where the law of the requested State so requires, the person whose [surrender] [transfer] [extradition] is sought shall be entitled to challenge the request for arrest and [surrender] [transfer] [extradition] in the court of the requested State on [only] the following grounds:

[(a) lack of jurisdiction of the Court;]

[(b) non bis in idem;[18] or]

[(c) the evidence submitted in support of the request does not meet the evidentiary requirements of the requested State as set forth in article 53 bis, paragraph 1 (b) (v) and (c) (ii).]]

6. Delayed or temporary [surrender] [transfer] [extradition]

If the person sought is being proceeded against or is serving a sentence in the requested State for an offence different from that for which [surrender] [transfer] [extradition] to the Court is sought, the requested State, after making its decision to grant the request, may:

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[18] Non bis in idem is treated in article 42.

(a) temporarily [surrender] [transfer] [extradite] the person to the Court and in that case, the Court shall return the person to that State after the completion of the trial or as otherwise agreed; or

(b) [with the consent of the Court [Pre-Trial Chamber] which shall rule after having heard the Prosecutor] postpone the [surrender] [transfer] [extradition] of the person until the completion or abandonment of the prosecution [or completion of service of the sentence].[19]

[7. Extradite or prosecute obligation[20]

(a) In the case of a crime to which article 20 (e) applies, the requested State [, if it is a party to the treaty in question but has not accepted the Court's jurisdiction with respect to that crime,] shall, where it decides not to [surrender] [transfer] [extradite] the accused to the Court, promptly take all necessary steps to extradite the accused to a State having requested extradition or [at the request of the Court] refer the case [through proceedings in accordance with national laws] to its competent authorities for the purpose of prosecution.

[(b) In any other case, the requested State Party shall [consider whether it can], in accordance with its legal procedures, take steps to arrest and [surrender] [transfer] [extradite] the accused to the Court, or [whether it should take steps to extradite the accused to a State having requested extradition or [at the request of the Court] refer the case to its competent authorities for the purpose of prosecution.]

[(c) The [surrender] [transfer] [extradition] of an accused to the Court will constitute, as between States Parties which accept the jurisdiction of the Court with respect to the crime in question, compliance with a provision of any treaty requiring that a suspect be extradited or that the case be referred to the competent authorities of the requested State for the purpose of prosecution.]]

[8. Provisions of evidence irrespective of [surrender] [transfer] [extradition]

[To the extent permitted under the law of the requested State] and without prejudice to the rights of third parties, all items found in the requested State [that have been acquired as a result of the alleged crime or] that may be required as evidence shall, upon request, be transmitted to the Court [if the [surrender] [transfer] [extradition] [is granted on conditions to be determined by the Court] even if the [surrender] [transfer] [extradition] of the person cannot be carried out.] [Any rights which third parties may have acquired in the said items shall be preserved where these rights exist. The property shall

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[19] If it is agreed that consent of the Court will be required for postponement, then the last set of brackets can be removed.

[20] The text of paragraph 7 (a) and (b) applies if there is a consent regime. If the Court has jurisdiction over core crimes and there is no consent regime, these provisions could be deleted.

be returned without charge to the requested State as soon as possible after the trial.]]

9. Transit of [surrendered] [transferred] [extradited] person[21]

(a) A State Party shall authorize transportation under its national procedural law through its territory of a person being [surrendered] [transferred] [extradited] to the Court by another State. A request by the Court for transit shall be transmitted in accordance with article 52. The request for transit shall contain a description of the person being transported, a brief statement of the facts of the case and the legal characterization and the warrant for arrest and [transfer] [surrender] [extradition]. A person in transit shall be detained in custody during the period of transit.

(b) [No authorization is required where air transportation is used and no landing is scheduled on the territory of the State of transit.]

(c) If an unscheduled landing occurs on the territory of the State of transit, it may require a request for transit as provided for in subparagraph (a). The State of transit shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing.

10. Costs

The costs associated with the [surrender] [transfer] [extradition] of a person shall be borne by [the [Court] [requested State]] [the Court or the requested State depending upon where the cost concerned arises].

Article 53 bis

Contents of request for [surrender] [transfer] [extradition][22]

1. A request for arrest and [surrender] [transfer] [extradition] shall be made in writing. In urgent cases a request may be made by any medium capable of delivering a written record,[23] provided that a request shall be confirmed [if

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[21] It has been suggested that this or other provisions could form the basis for a separate article. In addition, some felt that a number of details set forth in this text would be more appropriately regulated in the Rules.

[22] Portions of this article might also be provided for in the Rules rather than in the Statute.

[23] Issues relating to the security of this type of transmission will have to be discussed.

necessary] through the channel provided for in article 52.[24] The request shall contain or be supported by:

(a) information describing the person sought, sufficient to identify the person and information as to that person's probable location;

(b) in the case of a request for pre-indictment arrest and [surrender] [transfer] [extradition]:

(i) a copy of warrant for arrest;[25]

(ii) a statement of the reasons to believe the suspect may have committed a crime within the jurisdiction of the Court and that the Prosecutor expects to seek an indictment within [90] days;

(iii) a brief summary of the [essential] facts of the case;

(iv) a statement as to why pre-indictment arrest is urgent and necessary;[26]

(v) [such documents, statements, or other types of information regarding the commission of the offence and the person's role therein, which may be required by the laws of the requested State;] [however, in no event may the requested State's requirements be more burdensome than those applicable to requests for extradition pursuant to treaties with other States;]

(c) in the case of a request for post-indictment arrest and [surrender] [transfer] [extradition]:

(i) a copy of the warrant of arrest and indictment;

(ii) [such documents, statements, or other types of information regarding the commission of the offence and the accused's role therein which may be required by the laws of the requested State; [however, in no event may the requested State's requirements be more burdensome than those applicable to requests for extradition pursuant to treaties or other arrangements with other States;]]

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[24] Articles 52, 53 bis, 54 and 55 contain virtually identical provisions, some of which should be harmonized.

[25] The question of authentication of a warrant of arrest will be dealt with in the Rules.

[26] Article 28 covers pre-indictment arrest, while this paragraph also addresses the form of a request for pre-indictment arrest. The text of these two provisions must be examined together to ensure that there are no inconsistencies or duplications.

(d) in the case of a request for the arrest and [surrender] [transfer] [extradition] of a person already convicted:[27]

(i) a copy of any warrant of arrest for that person;

(ii) a copy of the judgement of conviction;

(iii) information to demonstrate that the person sought is the one referred to in the judgement of conviction;

(iv) (if the person sought has been sentenced,) a copy of the sentence imposed and a statement of any time already served and that remaining.

1 bis. A State Party shall notify the Court at the time of ratification, accession or approval whether it can [surrender] [transfer] [extradite] on the basis of a pre-indictment warrant and the information specified in paragraph 1 (b) or it can only [surrender] [transfer] [extradite] following [confirmation of indictment] [issuance of a post-indictment warrant] on the basis of the information in paragraph 1 (c).

[2. Where the requested State Party considers the information provided insufficient to allow it to comply with the request, it shall seek, without delay, additional information and may fix a reasonable time limit for the receipt thereof. [Any proceedings in the requested State may be continued, and the person sought may be detained, for such period as may be necessary to enable the Court to provide the additional information requested.] If the additional information is not provided within the reasonable time limit fixed by the requested State, the person may be released.]

[3. The Court may in accordance with article 43 withhold from the requested State specific information about any victims, potential witnesses and their families if it considers that it is necessary to ensure their safety or physical or psychological well-being. Any information that is made available under this article shall be provided and handled in a manner that protects the safety or physical or psychological well-being of any victims, potential witnesses and their families.][28]

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[27] It was suggested that this paragraph is an enforcement-of-sentence issue to be treated in part 8.

[28] This paragraph could also be included under article 52.

Article 54

Provisional arrest[29]

1. In case of urgency, the Court may request the provisional arrest of the person sought pending presentation of the request for [surrender] [transfer] [extradition] and supporting documents under article 53 bis.

2. The request for provisional arrest shall [be made by any medium capable of delivering a written record and shall] contain:

(i) a description of the person sought and information regarding the probable location of such person;

(ii) a brief statement of the essential facts of the case, including, if possible, the time and location of the offence;

(iii) a statement of the existence of a warrant of arrest or a judgement of conviction against the person sought, and, if applicable, a description of the specific offence or offences with which the person has been charged or for which he has been convicted; and

(iv) a statement that a request for [surrender] [transfer] [extradition] of the person sought will follow.

2 bis. The Court may withhold from the requested State specific information about any victims, potential witnesses and their families or close associates if it considers that it is necessary to ensure their safety or well-being. Any information that is provided under this article to the requested State shall be provided in a manner that protects the safety or well-being of any victims, potential witnesses and their families or close associates.

3. A person who is provisionally arrested may be discharged from custody upon the expiration of [ ][30] days from the date of provisional arrest if the requested State has not received the request for [surrender] [transfer] [extradition] and the supporting documents specified under article 53 bis. However, the person may consent to [surrender] [transfer] [extradition] before the expiration of this period if the legislation of the requested State allows.

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[29] ILC article 52 (1) (a) addresses provisional arrest, as well as search and seizure and other measures pertaining to mutual assistance. In order to present all proposals in a clear fashion, the present document treats provisional arrest in this article and the other matters in article 55. Article 28 provides for pre-indictment arrest under certain limited circumstances. To avoid confusion with the term of provisional arrest provided for in this article, it is for consideration whether the form of arrest in article 28 should be termed "provisional arrest". This article may have other implications for article 28.

[30] Some delegations have proposed a 30-day period, some a 40-day period and some a 60-day time period.

in which case that State shall proceed to [surrender] [transfer] [extradite] the person to the Court as soon as possible.[31]

4. The fact that the person sought has been discharged from custody pursuant to subparagraph (c) shall not prejudice the subsequent rearrest and [surrender] [transfer] [extradition] of that person if the request for [surrender] [transfer] [extradition] and supporting documents are delivered at a later date.

Article 55

Other forms of cooperation [and judicial and legal [mutual] assistance][32]

1. States Parties shall, in accordance with the provisions of this Part [and their national [procedural] law], comply with requests for assistance by the Court for:

(a) the identification and whereabouts of persons or the location of items;

(b) the taking of evidence, including testimony under oath, and the production of evidence, including expert opinions or reports necessary to the Court;

(c) the questioning of any suspect or accused;

(d) the service of documents, including judicial documents;

(e) facilitating the appearance of persons before the Court;

[(f) the temporary transfer of persons in custody, with their consent [which cannot be withdrawn], in order to provide testimony [or other assistance] to the Court;]

[(g) the conduct of on-site investigations and inspections[33] [with the consent of the requested State];]

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[31] It was suggested that the simplified surrender procedure should be the object of a separate paragraph, since it applies to both the provisional arrest stage and after a full surrender request has been submitted.

This paragraph could also be included in article 52.

[32] This issue has to be revisited after the title of part 7 is confirmed.

[33] This issue is also addressed in article 26 (2) bis which is being considered by the Working Group on Procedural Matters.

[(h) the conduct of proceedings of the Court in its territory with the consent of the requested State;][14]

(i) the execution of searches and seizures;

(j) the provision of records and documents, including official records and documents;

(k) the protection of victims and witnesses and the integrity of evidence;

(l) the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual confiscation without prejudice to the rights of bona fide third parties;[15] and

(m) any other types of assistance [not prohibited by the law of the requested State].

[2. Grounds for refusal

Option 1

A State Party shall not deny a request for assistance from the Court.

Option 2

A State Party may deny a request for assistance, in whole or in part, only if:[16]

(a) with respect to a crime [under [article 20 (b) through (e)] [article 20 (e)], it has not accepted the jurisdiction of the Court;

(b) the authorities of the requested State would be prohibited by its national laws from carrying out the action requested with regard to the investigation or prosecution of a similar offence in that State;

(c) execution of the request would seriously prejudice its national security, *ordre public* or other essential interests;

(c) bis the request concerns the production of any documents or disclosure of evidence which relates to its national [security] [defence];

(d) execution of the request would interfere with an ongoing investigation or prosecution in the requested State or in another State [or with a completed

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[14] The relationship between subparagraphs (g) and (h) and article 56 (4) needs to be examined.

[15] The issue of whether the Court is to be vested with such powers is being considered by the Working Group on Penalties.

[16] The list of possible grounds for refusal is not an agreed list.

investigation or prosecution that might have led to an acquittal or conviction, except that a request may not be denied if the investigation or prosecution relates to the same matter which is the subject of the request and the Court has determined that the case is admissible under article 35];

(e) compliance with the request would put it in breach of an existing [international law] [treaty] obligation undertaken to another [State] [non-State Party].]

[3. Before denying a request for assistance, the requested State shall consider whether the requested assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later time or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, it shall abide by them.]

4. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

[4 bis. If a requested State does not produce a document or disclose evidence under paragraph 2 (c) bis on the ground that it relates to its national defence, the Trial Chamber shall only make such inferences that relate to the guilt or innocence of the accused.][37]

5. Confidentiality[38]

(a) The Court shall ensure the confidentiality of documents and information except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts IV and V of the Statute and related Rules.

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[37] Views have been expressed that consideration should be given to establishing a mechanism for dealing with such sensitive information.

[38] The work of the Working Group on Procedural Matters on the protection of sensitive information and the protection of victims and witnesses may have an impact on this provision. Views have also been expressed that subparagraphs (b) and (c) should be addressed in the Rules.

6. Assistance by the Court[39]

(a) The Court [may] [shall], upon request, cooperate with and provide assistance [within its competence] to a State Party conducting an investigation into or trial in respect of acts which constitute a crime under this Statute [or which constitute a serious crime under the national law of the requesting State].

(b) (i) The assistance provided under subparagraph (a) shall include, among others:

(1) the transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and

(2) the questioning of any person detained by the Court;

(ii) In the case of assistance under subparagraph (b) (i) (1):

(1) If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;[40]

(2) If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 43[41] [and shall require the consent of that witness or expert];

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a non-State party.

7. Form and contents of the request

(a) Requests for judicial and legal [mutual] assistance shall:

(i) be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that it shall be confirmed [, if necessary,] through the channel provided for in article 52; and

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[39] Views have been expressed that subparagraphs (b) (i) and (ii) should be addressed in the Rules.

[40] The relationship with article 57 needs to be considered.

[41] This relates to the provisions on the protection of victims and witnesses.

(ii) contain the following, as applicable:

(1) a brief statement of the purpose of the request and the assistance sought, including the legal basis and grounds for the request;

(2) as much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(3) a brief description of the essential facts underlying the request;

(4) the reasons for and details of any procedure or requirement to be followed;

[(5) such information as may be required under the law of the requested State in order to execute the request;]

(6) any other information relevant to the assistance being sought.

(b) The Court may withhold, in accordance with article 43, from the requested State [or a State making a request under paragraph 6] specific information about any victims, potential witnesses and their families if it considers that this is necessary to ensure their safety or physical and psychological well-being. Any information that is made available under this article to the requested State shall be provided and handled in a manner that protects the safety or physical or psychological well-being of any victims, potential witnesses and their families.[42]

Article 56

Execution of requests under article 55

1. Requests for assistance shall be executed in accordance with the law of the requested State [and, unless prohibited by such law, in the manner specified in the request, including following any procedures outlined therein or permitting persons specified in the request to be present at and assist in the execution process[43] [by its competent authorities]].

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.[44]

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[42] Consideration needs to be given to whether this provision can be relocated to article 52 or article 56.

[43] There is a link between this provision and the empowerment provisions of paragraph 4.

[44] Views have been expressed that this should be addressed in the Rules.

3. Replies from States Parties, including any accompanying documents, [may be in the language of the requested State] [shall be in accordance with paragraph 2 of article 52. The Court may also request the transmission of documents in their original language].

[4. The [Prosecutor] [Court] may [, if requested,] assist the authorities of the requested State with the execution of the request for judicial assistance [and may, with the consent of the requested State, carry out certain inquiries on its territory].][45]

[4 bis. [For the purposes of paragraph 4,] the requested State shall, upon request, inform the Court of the time and place of execution of the request for assistance.][46]

5. (a) The ordinary costs for execution of requests in the territory of the requested State shall be borne by the requested State except for the following which should be borne by the Court:

(i) Costs associated with the travel and security of witnesses and experts or the transfer of persons in custody;

(ii) Costs of translation, interpretation and transcription;

(iii) The travel and subsistence costs of the Prosecutor, members of his office or any other member of the Court; and

(iv) The costs of any expert opinion or report requested by the Court.

(b) Where the execution of a request will result in extraordinary costs, [there shall be consultations to determine how those costs will be met] [those costs shall be met by the Court].

(c) The provisions in this paragraph shall apply with appropriate modifications to requests made to the Court for assistance.[47]

[6. (a) Witnesses or experts may not be compelled to testify at the seat of the Court.

[(b) If they do not wish to travel to the seat of the Court, their evidence shall be taken in the country in which they reside or in such other place as

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[45] Views have been expressed that paragraph 1 is an alternative to this paragraph.

[46] Views have been expressed that this should be addressed in the Rules.

[47] Similar provisions may have to be inserted elsewhere to address the situation where the Court renders assistance to States or States Parties.

they may agree upon with the Court [in accordance with national requirements [and in compliance with international law standards][48]].

(c) In order to guarantee the safety of witnesses and experts, any means of communication may be used to take their evidence while preserving their anonymity.[49]][50]

[(d) No witness or expert who appears before the Court may be prosecuted, detained or submitted to any restriction of personal freedom by the Court in respect of any acts [or omissions] that preceded the departure of that person from the requested State.]

7. Provisions allowing a person heard or examined by the Court under article [...] to invoke restrictions designed to prevent disclosure of confidential information connected with national defence or security also apply to the execution of requests for assistance under this article.

[Article 57

Rule of speciality

1. Limit on other proceedings against [surrendered] [transferred] [extradited] person

A person [surrendered] [transferred] [extradited] to the Court under this Statute shall not be:

(a) proceeded against, punished or detained for any criminal act other than that for which the person has been [surrendered] [transferred] [extradited];

(b) [surrendered] [transferred] [extradited] to another State in respect of any criminal act[51]

[except when he or she commits the criminal act after [extradition] [surrender] [transfer]].

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[48] The exact formulation will depend on the formulation adopted for article 44.

[49] The protection of witnesses is also addressed in articles 26 and 43.

[50] Views have been expressed on the relationship between subparagraphs (b) and (c) and article 37 on trial in the presence of the accused.

[51] The issue of transfer, etc., from the State of enforcement of a sentence of imprisonment to a third State is addressed in article 59 (4).

2. Limit on other uses of evidence

Evidence provided by a State Party under this Statute shall [, if that State Party so requests,] not be used as evidence for any purpose other than that for which it was provided [unless this is necessary to preserve a right of the accused under article 41 (2)].

3. Waiver of rule by the requested State

The Court may request the State concerned to waive the requirements of paragraphs 1 or 2, for the reasons and purposes to be specified in the request. In the case of paragraph 1, this request shall be accompanied by an additional warrant of arrest and by a legal record of any statement made by the accused with respect to the offence.][52]

PART 8. ENFORCEMENT[53]

Article 58

General obligation regarding recognition [and enforcement] of judgements

States Parties [shall] [undertake to recognize] [[and to] enforce directly on their territory] [give effect to] the judgements of the Court [, in accordance with the provisions of this Part].

[The judgements of the Court shall be binding on the national jurisdictions of every State Party as regards the criminal liability of the person convicted and the principles relating to compensation for damage caused to victims and the restitution of property acquired by the person convicted and other forms of reparation ordered by the Court, such as restitution, compensation and rehabilitation.][54]

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[52] These square brackets reflect the view that there should be no rule of speciality in the Statute.

[53] One delegation was of the view that part 8 deals with issues also relevant to judicial assistance and that there might be grounds for non-recognition or non-enforcement of judgements.

[54] There was a question whether this sort of provision should be in article 45, article 47 or in part 8.

Article 59

Role of States in enforcement [and supervision] of sentences of imprisonment

1. Obligation versus consent of States Parties[55]

Option 1

A sentence of imprisonment shall be served in a State designated by the Court [Presidency].

Option 2

(a) A sentence of imprisonment shall be served in a State designated by the Court [Presidency] from a list of States which have indicated to the Court their willingness to accept sentenced persons. [The State so designated shall promptly inform the Court [Presidency] whether it accepts the request.]

[(b)[56] A State may make its consent conditional [on the applicability of its domestic laws relating to pardon, conditional release and commutation of sentence, and on its administration of the sentence. In this case, the consent of the Court is not required to subsequent actions by that State in conformity with those laws, but the Court shall be given at least 45 days' notice of any decision which might materially affect the terms or extent of the imprisonment].]

1 bis.

(a) The Court's [Presidency's] designation of a State under paragraph 1 shall be governed by principles [of equitable [geographic distribution] [burden sharing]] to be elaborated by [the Permanent Committee of States Parties.][57] [However, no such designation shall be made with respect to the State where or against which the crime was committed or the State of which the convicted person or the victim is a national [, unless the Court [Presidency] explicitly decides otherwise for reasons of social rehabilitation].]

(b) In making a designation under paragraph 1, the Court [Presidency] shall allow the person sentenced to provide views on any concerns as to personal security or rehabilitation. However, the consent of the person is not required for the Court [Presidency] to designate a particular State for enforcement of the sentence.

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[55] The issue arises as to whether provision should be made concerning whether non-States Parties should accept sentenced persons for imprisonment.

[56] If retained, this provision will need to conform with provisions of article 60 below.

[57] This reflects a current proposal for the establishment of a Permanent Committee of States Parties.

1 ter.

If no State is designated under paragraph 1, the sentence of imprisonment shall be served in the prison facility made available by the host State, in conformity with and under the conditions as set out in the Host State Agreement, as referred to in article 3, paragraph 2.

2. Enforcement of the sentence[58]

(a) The sentence of imprisonment shall be binding on the States Parties, which may in no case modify it.

(b) The Court alone shall have the right to decide any application for review of the [judgement] [sentence]. The State of enforcement shall not impede the sentenced person from making any such application.

3. Supervision and administration of sentence

(a) The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court [Presidency] [, and the Court shall ensure that internationally recognized standards of treatment of prisoners are fully guaranteed].

Option 1 for (b)

[(b) The conditions of detention shall be governed by the law of the State of enforcement. [However, the Court [Presidency] may, on its own motion or at the request of the sentenced person, modify the conditions of detention of the sentenced person. The State of enforcement shall enforce the modified conditions of detention. The Court [Presidency] may also on its own motion, or at the request of the sentenced person or the State of enforcement, decide that the sentenced person be transferred to another State for the continued serving of the sentence [provided that State agrees].

[(b) bis Internationally recognized standards of treatment of prisoners shall be fully guaranteed by the State of enforcement.]

Option 2 for (b)

[(b) The conditions of detention shall be governed by the law of the State of enforcement, in accordance with internationally recognized minimum standards, but in any case not more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.]

(c) Communications between persons sentenced and the Court shall be unimpeded [and confidential].

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[58] It was suggested that this paragraph should be moved to the beginning of the article.

4. Transfer of the person upon completion of sentence

(a) Unless the State of enforcement agrees to permit the prisoner to remain in its territory following completion of sentence, the prisoner shall be released into the custody of the State of the person's nationality or another State that has agreed to receive the person.

(b) The costs involved in transporting the prisoner to another State under paragraph 1 shall be borne by the Court, unless the State of enforcement or the receiving State agree otherwise.

(c) [Unless prohibited by the provisions of article 57] [with the consent of the Court as provided in article 59 bis],[59] the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the prisoner to the State which has requested the extradition or surrender of the prisoner for purposes of trial or enforcement of a sentence.

[Article 59 bis

Limitation of prosecution/punishment for other offences[60]

1. A sentenced person in the custody of the State of enforcement shall not be subjected to prosecution or punishment [or extradition to a third State] for any conduct committed prior to delivery to the State of detention, unless such prosecution or punishment [or extradition] has been approved by the Court [Presidency] [at the request of the State of detention].

2. The Court [Presidency] shall rule on the matter after having heard the prisoner.

3. Paragraph 1 of this article shall cease to apply if the sentenced person remains more than 30 days on the territory of the State of enforcement after having served the full sentence imposed by the Court.]

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[59] There is a question as to whether the permissibility of re-extradition of the prisoner should be addressed in article 57 (Rule of Speciality) or in article 59 bis.

[60] Consideration should be given to the relationship of this article to the rule of speciality, as found in article 57. This article is also related to article 53, paragraph 6, regarding temporary or delayed surrender.

[Article 59 ter

Enforcement of fines and forfeiture measures[61]

1. States Parties shall [, in accordance with their national law,] enforce fines and forfeiture measures [and measures relating to compensation or restitution [reparation]][62] as fines and forfeiture measures [and measures relating to compensation or restitution [reparation]] rendered by their national authorities.

[For the purpose of enforcement of fines, the Court [Presidency] may order the forced sale of any property of the person sentenced which is on the territory of a State Party. For the same purposes, the Court [Presidency] may order the forfeiture of proceeds, property and assets and instrumentalities of crimes belonging to the person sentenced.][63] [64]

2. Property, including the proceeds of the sale thereof, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be handed over to the Court [Presidency] [which will dispose of that property in accordance with the provisions to paragraph 3 of article 47].]

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[61] The use of the term "forfeiture" rather than "confiscation" reflects the current discussions on this issue in the Working Group on Penalties. This issue is related to the discussion of penalties.

[62] References to fines, forfeiture, restitution or compensation, or similar terms, will depend on the range of sanctions and compensatory measures ultimately provided for in article 47.

[63] There is a question whether this provision concerns enforcement of sentences, or rather the powers of the Court to order particular measures relating to enforcement of fines or confiscation. If it is meant to refer to States enforcing specific orders relating to fines or confiscation, then paragraph 1 might be amended to make clear that that enforcement by States Parties would include "giving effect to orders of the Court relating to enforcement of fines or forfeitures, such as the seizure of particular property or the forced sale of property of the convicted person to satisfy a fine".

[64] There was a suggestion that this paragraph should be placed first.

Article 60[65]

Pardon,[66] parole and commutation of sentences [early release]

Option 1 (abbreviation of ILC text)

1. The prisoner may apply to the Court [Presidency] for a [decision on] [ruling regarding the appropriateness of] [pardon,] parole or commutation of sentence, if under a generally applicable law of the State of enforcement, a person in the same circumstances who had been convicted for the same conduct by a court of that State would be eligible for [pardon,] parole or commutation of sentence.

Option 2

1. (a) The State of enforcement shall not release the prisoner before the expiry of the sentence as pronounced by the Court.

(b) The Court [Presidency] alone shall have the right to decide any application for [commutation of the sentence] [commutation of the sentence or parole] [commutation of the sentence, parole or [pardon]]. [If appropriate in the circumstances, parole may be granted after the prisoner has served:

(i) not less than 20 years in case of life imprisonment;

(ii) not less than two thirds of the term in case of imprisonment for a definite term.

Parole may be revoked when the parolee is convicted of having committed an offence while on parole, or has violated any condition of his parole.]

2. Procedures regarding an application for commutation of sentence [or parole [or pardon]] and the Court's decision on such an application shall be governed by the Rules of Procedure.

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[65] In the discussion of the Working Group on Penalties, it was suggested that, to meet concerns of several delegations regarding the severity of a life sentence or a long sentence of imprisonment, article 60 should provide a mandatory mechanism by which the prisoner's sentence would be re-examined by the Court after a certain period of time, in order to determine whether he or she should be released. In this way, the Court could also ensure the uniform treatment of prisoners regardless of the State where they served their sentence.

[66] A concern was expressed that pardon might involve political considerations which would not be appropriate for determination by the Court, so that the authority to decide on an application for pardon might better be vested in the Permanent Committee of States Parties.

[Article 60 bis

Escape

In the event of an escape, the sentenced person shall, as soon as he has been arrested pursuant to a request of the Court under article 53 bis (1) (d), be delivered to the State in which he was serving his sentence or to another place determined by the Court.]

Annex V

REPORT OF THE WORKING GROUP ON PENALTIES*

1. The Working Group recommends to the Preparatory Committee the text of the provisions concerning penalties contained in documents A/AC.249/1997/WG.6/CRP.2/Rev.1; A/AC.249/1997/WG.6/CRP.3/Rev.1; and A/AC.249/1997/WG.6/CRP.4-13, as a first draft for inclusion in the draft consolidated text of a convention for an international criminal court.

2. The issue of the death penalty was not discussed by the Working Group, which recommends that the text concerning the death penalty, as contained in A/AC.249/1997/WG.6/CRP.1, under the heading A (e), should be included in the draft consolidated text.

3. The issue of effect of the judgement, compliance and implementation, as contained in A/AC.249/1997/WG.6/CRP.1, under the heading G, was not discussed by the Working Group, which suggested that it should be dealt with in the context of enforcement of sentences. The text referred to above should accordingly be reflected in the draft consolidated text.

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* Incorporating the documents enumerated in paragraph 1 and the texts referred to in paragraphs 2 and 3.

PENALTIES

A. The penalties

The Court may impose on a person convicted under this Statute [one or more of the following penalties] [the following penalty]:

(a)[1] [a term of life imprisonment or imprisonment for a specified number of years;]

[a maximum term of imprisonment of [30] years;]

[a definite term of imprisonment between [20] and [40] years [, unless this is reduced according to the provisions of this Statute][2];]

[The Court may attach to the sentence of imprisonment a minimum period during which the convicted person may not be granted any [release under relevant provisions of Part VIII of the Statute].]

[In the case of a convicted person under the age of 18 years at the time of the commission of the crime, a specified term of imprisonment of no more than 20 years];

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[1] To meet concerns of several delegations regarding the severity of a life sentence or a long sentence of imprisonment, it was suggested that part 8, article 60, should provide a mandatory mechanism by which the prisoner's sentence would be reexamined by the Court after a certain period of time, in order to determine whether he or she should be released. In this way, the Court could also ensure the uniform treatment of prisoners regardless of the State where they served their sentence.

[2] The view was expressed that if such a provision providing for minimum sentencing is included, there should be a reference to factors that may reduce the minimum sentence. In such a case, the list of relevant factors should be exhaustive. It was suggested that among those factors could be the following: (i) diminished mental capacity that falls short of exclusion of criminal responsibility; (ii) the age of the convicted person; (iii) as appropriate, duress; and (iv) the subsequent conduct of the convicted person.

[When imposing a penalty on a person under the age of 18 years [at the time of the commission of the crime], the Court shall determine the appropriate measures to ensure the rehabilitation of the offender][1]

[(b) A fine [in addition to a sentence of imprisonment on conviction of a crime under article 20]];[2]

[(c)

(i) [[disqualification from seeking public office for the person's term of imprisonment and any further period of time that may be imposed] [in the modality and to the extent that the penalty could be imposed in accordance with the laws of the State in which such a penalty is to be enforced];][3]

(ii)[4] a forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct, without prejudice to the rights of bona fide third parties. [When the whole or part of the [instrumentalities of crime or] proceeds, property, assets mentioned in ... cannot be forfeited, a sum of money equivalent thereto may be collected.];[5]]

[(d) Appropriate forms of reparation]

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[1] The following proposals were made which should be treated either under age of responsibility or the jurisdiction of the Court:

"[The Court shall have no jurisdiction over those who were under the age of 18 years at the time they are alleged to have committed a crime which would otherwise come within the jurisdiction of the Court] [; however, under exceptional circumstances, the Court may exercise jurisdiction and impose a penalty on a person aged 16 to 18 years, provided it has determined that the person was capable of understanding the unlawfulness of his or her conduct at the time the crime was committed]."

[2] A number of delegations suggested that penalties for procedural crimes be included in relevant provisions of the Statute, along the following lines: "on conviction of perjury or contempt of the Court, as an ordinary penalty or as a supplementary penalty in addition to a sentence of imprisonment".

[3] Some delegations held the view that such a provision would give rise to difficult issues of enforcement.

[4] The terms in this provision should be brought into line with similar terms used elsewhere in this Statute once those provisions are finalized.

[5] It was suggested that forfeiture not be included as a penalty, but instead be included as a mechanism which the Court would request States to use with regard to execution of an order for reparations. According to this view, a provision on forfeiture could be considered as a separate paragraph of this article or elsewhere in the Statute.

[[without prejudice to the obligation on every State to provide reparation in respect of conduct engaging the responsibility of the State][*] [or reparation through any other international arrangement], appropriate forms of reparation [,[including] [such as] restitution, compensation and rehabilitation]][**]

[(e) (Death penalty)][***]

Option 1

[death penalty, as an option, in case of aggravating circumstances and when the Trial Chamber finds it necessary in the light of the gravity of the crime, the number of victims and the severity of the damage.]

Option 2

No provision on death penalty.

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[*] It was suggested that there was no need for such a clause relating to State responsibility, since it was already dealt with in the context of rules on individual criminal responsibility (see A/AC.249/1997/L.5, article B a, para. 4).

[**] A number of delegations suggested that the Statute should address the issue of reparations to victims and their families. Opinions were divided as to whether this issue should be dealt with in the context of penalties. It was suggested that it could usefully be dealt with within the framework of the Working Group on Procedural Matters. It was also noted that the issue of reparations had a bearing on rules of enforcement in the ILC Statute, part 8. A number of delegations expressed the view that there might be merit in dealing with these issues in a unified way focusing on all the issues related to compensation.

[***] See paragraph 2 of the report of this Working Group, above.

B. Aggravating and mitigating circumstances

In determining the sentence, the Court shall, in accordance with the Rules of the Court, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.[11]

C. Prior detention

In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

D. Applicable national legal standards[12]

Option 1

[In determining the length of a term of imprisonment or the amount of a fine to be imposed, [or property to be forfeited,] the Court [may have regard to the penalties provided for by law of] [shall impose the highest penalty provided for by the law of either]:

(a) [the State of which the convicted person is a national];

(b) [the State where the crime was committed;] [or]

(c) [the State which had custody of and jurisdiction over the accused.]

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[11] It may be impossible to foresee all of the relevant aggravating and mitigating circumstances at this stage. Many delegations felt that factors should be elaborated and developed in the rules of the Court, while several other delegations expressed the view that a final decision on this approach would depend upon the mechanism agreed for adopting the Rules. Among the factors suggested by various delegations as having relevance were: the impact of the crime on the victims and their families; the extent of damage caused or the danger posed by the convicted person's conduct; the degree of participation of the convicted person in the commission of the crime; the circumstances falling short of exclusion of criminal responsibility such as substantially diminished mental capacity or, as appropriate, duress; the age of the convicted person; the social and economic condition of the convicted person; the motive for the commission of the crime; the subsequent conduct of the person who committed the crime; superior orders; the use of minors in the commission of the crime.

[12] It was suggested that this issue should be dealt with only in the context of ILC article 33 on applicable national laws. Another suggestion was to move this issue to section B above. Moreover, the view was held that this kind of provision should be avoided altogether.

[In cases where national law does not regulate a specific crime, the Court will apply penalties ascribed to analogous crimes in the same national law.]]

Option 2

No provision on national legal standards.

F. Sentences of imprisonment for multiple crimes

When a person had been convicted of more than one crime, the Court shall:

Option 1

[pronounce a single sentence of imprisonment [not exceeding the maximum sentence prescribed for the gravest crime] [, increased by half]]

Option 2

[indicate whether multiple sentences of imprisonment shall be served consecutively or concurrently.]

[F. New article 47 bis. Legal persons][*]

[A legal person shall incur one or more of the following penalties:

[(i) fines;

[(ii) dissolution;

[(iii) prohibition, for such period as determined by the Court, of the exercise of activities of any kind;]

[(iv) closure, for such a period as determined by the Court, of the premises used in the commission of the crime;]

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* Consideration could be given to inserting an express provision to this effect.

** Inclusion of a provision on such penalties would depend on the outcome of considerations in the context of individual criminal responsibility for legal persons.

*** It was suggested that such provisions may give rise to issues of enforcement in the context of part 8 of the ILC draft.

[(v) forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct;[16]] [and]

[(vi) appropriate forms of reparation][17]]

G. New article 47 ter. Fines [and assets] collected by the Court][18]

[Fines [and assets] collected by the Court may be transferred, by order of the Court, to one or more of the following:

[(a) [as a matter of priority,] a trust fund [established by the Secretary-General of the United Nations] or [administered by the Court] for the benefit of victims of the crime [and their families];]

[(b) a State the nationals of which were the victims of the crime;]

[(c) the registrar, to defray the costs of the trial.]]

[H. Effect of the judgement. Compliance. Implementation][19] [20]

[(a) The judgement of the Court shall be binding on the national jurisdictions of every State Party as regards the criminal liability of the person convicted and the principles relating to compensation for damage caused to victims and the restitution of property acquired by the person convicted [and other forms of reparation ordered by the Court].

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[16] See footnote 7 concerning forfeiture for physical persons. There may be merit in adopting a unified approach in both provisions, including all relevant qualifications.

[17] See footnote 9 concerning reparation in the context of physical persons. There may be merit in adopting a unified approach in both provisions, including all relevant qualifications.

[18] It was suggested that this issue may be linked to the provisions on fines under section A above and enforcement in Part 8. It was also suggested that there may be options other than (a) and (b) as to the manner in which fines or assets collected by the Court could be distributed to victims. All these issues may be dealt with in the context of a further discussion on matters related to compensation.

[19] See paragraph 3 of the report of this Working Group, above.

[20] It was suggested that all the issues contained in this item, which include, inter alia, recognition of judgement, should be dealt with in the context of part 8 on enforcement of sentences.

(b) For the purpose of enforcement of fines [or reparation] imposed by the Court, the Presidency may order the forced sale of any property of the person sentenced which is on the territory of a State Party.

For the same purpose, the Presidency may order the confiscation of any sum of money or securities belonging to the person sentenced.

Decisions by the Presidency are implemented by States Parties in conformity with their domestic laws.

[The provisions of this article shall apply to legal persons.]]